UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

INWOOD MATERIAL TERMINAL, LLC,
Employer,

And Case No. 29-RD-206581

CARLOS CASTELLON,
Petitioner,

and

UNITED PLANT & PRODUCTION WORKERS
LOCAL 175 P,
Union.

BRIEF OF *AMICUS CURIAE* NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION

On March 8, 2018, the eleven eligible bargaining unit employees of Inwood Material Terminal ("Employer") voted unanimously, 11-0, to decertify the United Plant & Production Workers ("Union"). *See* R&D Decision on Objections & Certification of Results (May 2, 2018).[1]

Despite that overwhelming rejection, the Union attempts to litigate its way back into power over these employees through a legal technicality, arguing that an unsigned agreement constitutes a contract bar. The Union claims that a proposed collective bargaining agreement, which the employer did not execute, falls into a narrow exception to *Appalachian Shale's* bright line rule that all parties must sign a contract for it to bar an election petition. *Appalachian Shale Prods.*, 121 NLRB 1160, 1162 (1958). Specifically, it argues that the Employers' email containing a proposed agreement was a signed offer, and the Union's execution was a signed acceptance.

[1] Results of the election available at http://apps.nlrb.gov/link/document.aspx/09031d45827c1c16

If the contract bar doctrine requires the return of a union that garnered zero votes in a secret ballot election, the bar must be reconsidered. Reinstalling a union that was *unanimously* rejected by the employees only encourages industrial discord and undermines the core purpose of the Act—employee free choice. Indeed, this case highlights the problem with the contract bar, namely that it sacrifices employee free choice at the altar of a narrow view of "labor stability." But worksite stability cannot be achieved by forcing employees to accept a union contract that *no one* in the unit wants. It turns the fundamental principle of labor law on its head—it makes the union the master of the employees and the employees "prisoners of the union." *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 73 (1975) (Douglas, J., dissenting).

The Board should use this case as an opportunity to reevaluate and overrule the contract bar doctrine. Alternatively, if it keeps the contract bar, the Board should adjust the rule of *Appalachian Shale* to require all parties to actually sign a contract and do away with the exception that parties may create a bar through separate documents that constitute a "proposal" and an executed "acceptance."

ARGUMENT

I. The Board should eliminate the contract bar doctrine.

The "contract bar" is an invention of the Board. It has no basis in the statutory language of Section 9 of the National Labor Relations Act or in the Act's legislative history. It should be dispensed with on these grounds alone, as the Board correctly held in *New England Transp. Co.*, 1 NLRB 130, 138-39 (1936). The contract bar has become a device that entrenches unions regardless of majority support, thereby undermining the cornerstone of the Act—voluntary unionism and employee free choice to select or remove a union as their collective bargaining representative. This is particularly clear here where the Union has absolutely no support.

A. The Act's guiding principle is employee free choice, and the Board must protect this at every step of the process.

Employee free choice under Sections 7 and 9 is the Act's paramount objective. *See Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992); *Pattern Makers' v. NLRB*, 473 U.S. 95 (1985); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1463 (D.C. Cir. 1997) (Sentelle, J., concurring); *see also NLRB v. B.A. Mullican Lumber & Mfg. Co.*, 535 F.3d 271, 284 (4th Cir. 2008) (because the NLRA protects employee free choice, the Board "may not appropriately seek a bargaining order . . . that it knows is contrary to the will of a majority of the employees"). Consequently, exclusive union representation requires *actual* majority support. *See* 29 U.S.C. § 159(a) (defining "[e]xclusive representatives" as "[r]epresentatives designated or selected for the purposes of collective bargaining by the *majority* of the employees in a unit appropriate for such purposes . . . .") (emphasis added).

Despite the Act's "bedrock principles of employee free choice and majority rule," *Gourmet Foods, Inc.*, 270 NLRB 578, 588 (1984), the Board has created from whole cloth a number of election "bars" that prevent legitimate employee petitions from being processed and elections from occurring. The Board justifies its bar doctrines on the basis of "industrial stability," but the bars' main purpose is to "protect [incumbent] unions from decertification or displacement by a rival union," *Americold Logistics*, 362 NLRB No. 58, slip op. at *11 (Member Miscimarra, dissenting).

Any notion that the *highest* purpose of the NLRA is to aid incumbent unions to foster "labor peace" is false.[2] The policy of "encouraging the practice and procedure of collective bargaining,"

[2] Section 7 of the Act could not be clearer: "Employees shall have the right to self- organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . . *and shall also have the right to refrain from any or all such activities* . . . ." 29 U.S.C. § 157 (emphasis added). Similarly, Section 8(a)(3) precludes "discrimination in regard to

stated in the Act's preamble, 29 U.S.C. § 151, does not mean the Act favors unions or employees who support union representation more than employees who wish to refrain from union representation. *See Baltimore Sun Co. v. NLRB*, 257 F.3d 419, 426 (4th Cir. 2001) (Section 7 "guards with equal jealousy employees' selection of the union of their choice and their decision not to be represented at all."). Only where a majority of employees freely select union representation is there any policy interest in promoting collective bargaining or labor stability. *Cf. IBM Corp.*, 341 NLRB 1288 (2004) (*Weingarten* rights have no application in a setting where the employees have chosen to refrain from being represented by a union); *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 384 (1998) ("Stability, while an important goal of the Act, . . . is not its be-all and end all.") (Rehnquist, C.J., dissenting in part). As former Member Brame cogently stated, the Board must be mindful that "unions exist at the pleasure of the employees they represent. Unions represent employees; employees do not exist to ensure the survival or success of unions." *MGM Grand Hotel, Inc.*, 329 NLRB 464, 475 (1999).

Because collective bargaining follows employee free choice, the Act's policy of promoting stable collective bargaining relationships favors secret-ballot elections whenever employees desire to change their status quo, not election bars that prevent expression of employee free choice. Unless and until the NLRB conducts an election to determine whether employees truly support or oppose union representation, the interest of "encourage[ing] the practice and

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hire or tenure of employment or any term or condition of employment *to encourage or discourage membership in any labor organization*." 29 U.S.C. § 158(a)(3) (emphasis added). Further, Section 9 grants employees the right to file an election petition "alleging that a substantial number of employees (i) wish to be represented for collective bargaining . . . or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, *is no longer a representative* as defined in section 9(a)." 29 U.S.C. § 159(c)(1)(A) (emphasis added).

procedure of collective bargaining" cannot be fulfilled, because the employer-recognized union may in fact lack majority employee support.

If anything, the continuing imposition of a minority union on unwilling employees only weakens industrial stability because it results in employee frustration and even outrage at the injustice of being locked in with an unwanted union. This was demonstrated in *Rollins Transportation System*, 296 NLRB 793 (1989), in which an employer recognized a union even though there was conflicting evidence as to whether employees truly supported that union. The Board recognized that the overriding interest at issue was "employees' Section 7 rights to decide whether and by whom to be represented." *Id.* at 794. Accordingly, the Board wisely declined to defer to the employer's determination as to whether and who should represent the employees, as that would "impose a collective bargaining representative on the employees on the basis of the employer's action rather than the employees' free choice." *Id.* at 795. Instead, the *Rollins* Board recognized that "[a] Board election is the arena for exercise of the employee's right to free choice, a right closely guarded by the Act," and ordered that an election be held. *Id.* at 793; *see also Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531, 537 (D.C. Cir. 2003) (recognizing that "colluding" employers and unions can misuse the contract bar "at the expense of employees and rival unions").[3]

[3] That secret ballot elections are needed to curb employer and union collusion not only makes sense, but has been borne out in practice. There exists a long and sordid history of employers and favored unions making backroom deals that disregard employee free choice. *See, e.g.*, *Duane Reade, Inc.*, 338 NLRB 943 (2003), *enforced sub nom. Duane Reade Inc. v. NLRB*, 2004 WL 1238336 (D.C. Cir. June 10, 2004) (union and employer conspired to achieve "voluntary recognition" of a minority union favored by the employer); *Shore Health Care Ctr., Inc.*, 317 NLRB 1286 (1995), *enforced sub nom. Fountainview Car Ctr. v. NLRB*, 88 F.3d 1278 (D.C. Cir. 1996) (supervisors and other agents of the employer actively encouraged employees to support the union); *NLRB v. Windsor Castle Healthcare Facilities, Inc.*, 13 F.3d 619 (2d Cir. 1994), *enforcing* 310 NLRB 579 (1993) (employer provided sham employment to union organizers and assisted their recruitment efforts); *Kosher Plaza Supermarket*, 313 NLRB 74, 80-82 (1993)

Because employee free choice is the primary principle behind the Act, and labor stability is, at best, a secondary objective, election bars that are not expressly mandated by the Act are unnecessary and harmful to its fundamental purpose. The Act contains only one election bar, which prevents holding more than one valid election within a twelve-month period. Section 9(c)(3) of the Act states: "[n]o election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held." 29 U.S.C. § 159. Had Congress intended the creation of other election bars, it could have done so explicitly. Because Board-devised election bars inevitably squash valid demonstrations of employee free choice, they should be eliminated.

B. The development of the contract bar.

Originally, the Board rejected a contract bar. In *New England Transp. Co.*, 1 NLRB 130 (1936), a contract was asserted as a bar to an election. The Board held that employees should be free to change their representative and that the new representative could be required to assume the existing agreement. The principle was that

> a change in representation does not alter or cancel any existing agreement made in behalf of the employees by [their] . . . exclusive representatives. The only effect of a certification by the Board is that the employees have chosen other agents to represent them in dealing with management under the existing agreement.

Id. at 139. Of course, the new representative was free to demand changes to the current contract,

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(employer threatened discharge of employees who refused to sign cards for favored union); *Brooklyn Hosp. Ctr.*, 309 NLRB 1163 (1992), *aff'd sub nom. Local 144, Hotel, Hosp., Nursing Home & Allied Servs. Union v. NLRB*, 9 F.3d 218 (2d Cir. 1993) (employer permitted local union, which it had already recognized, to meet on its premises for the purpose of soliciting union membership); *Famous Casting Corp.*, 301 NLRB 404, 407 (1991) (employer unlawfully supported union and coerced employees into signing authorization cards); *D & D Dev. Co.*, 282 NLRB 224 (1986) (employer actively participated in the union organizational drive from start to finish); *Roundup Co.*, 282 NLRB 1 (1986) (employer invited favored union to attend hiring meeting with employees, at the expense of a rival union).

as "parties may bargain with respect to the termination of existing contracts." *Id.*

The Board first developed a contract bar in *National Sugar Ref. Co.*, 10 NLRB 1410 (1939). There, the Board stated that it would not conduct an election because the duration of the contract—one year—was not "contrary to the purposes and policies of the Act," *id.* at 1415, a proposition we have just shown to be erroneous. The bar was eventually extended to agreements lasting at least two years, *Pacific Coast Ass'n of Pulp & Paper Mfg.*, 121 NLRB 990 (1958).

In 1962, the Board again extended the contract bar's duration, this time to three years. *General Cable Corp.*, 139 NLRB 1123 (1962). Currently, collective bargaining agreements "of definite duration for terms up to 3 years will bar an election for their entire period," and "contracts having longer fixed terms will be treated for bar purposes as 3-year agreements and will preclude an election for . . . their initial 3 years." *Id.* at 1125; *see also NLRB v. Burns Int'l Security Serv.*, 406 U.S. 272, 290 n.12 (1972). During this now elongated "contract bar" period, the Board dismisses all representation petitions unless they are filed during a 30-day "open period" that begins 90 days and ends 60 days before the contract expires, or during any period following expiration in which no contract is in effect. *See Leonard Wholesale Meats, Inc.*, 136 NLRB 1000, 1000-01 (1962).

C. The contract bar should be reevaluated for five reasons.

There are five principal reasons why the alleged "stability" of a contract bar should not outweigh employee free choice. *First*, the contract bar has no basis in the Act and undermines the purpose of the Act—employee free choice. Were it Congress' intent to limit employees' "full freedom of association" beyond the one-year "election bar" period that is provided for in the statutory text, Congress would have included language to that effect. That it did not do so is evidence that the contract bar is inconsistent with the statute and that Congress did not intend to

so restrict employee free choice. This is bolstered by the fact that under the earliest interpretation of the Act, in *New England Transp. Co.*, the Board altogether rejected the contract bar.

Second, the contract bar helps entrench unions in perpetuity by keeping them in power unless employees file for an election during the short thirty-day "open period" that falls two to three months before the end of a contract. Under the contract bar regime, employees must have the foresight and legal knowledge to plan their decertification far in advance of the contract's expiration. Otherwise, they may have no opportunity to file for an election if their employer and union agree to a successor contract during the sixty-day insulated period. The narrow thirty-day window does not adequately protect employees' rights to choose their own representative. Indeed, by the time employees learn of their right to decertify, or even begin to contemplate it, the thirty-day window period may already have passed and another contract executed.

Third, the vast majority of union represented employees—an astonishing 94%—have never have voted for the union that exclusively represents them.[4] This shocking figure warrants adjusting the Board's election bar policies to provide employees' with more opportunities to vote on whether they truly desire union representation.

Fourth, barring employees from voting on union representation once a contract is in place does not aid industrial stability because employees usually cannot judge a union's effectiveness until *after* it agrees to a contract. Employees should be able to vote on whether they wish to work under a particular union contract. Currently, however, if a union and employer agree to a contract that the employees dislike, the employees have little recourse against the union because the contract bar prevents them from requesting an election for up to three years. This fact, at the very

[4] James Sherk, "Unelected Representatives: 94 percent of Union Members Never Voted for a Union," Heritage Foundation *Backgrounder* No. 3126 (Aug. 30, 2016), http://www.heritage.org/research/reports/2016/08/unelected-representatives-94-percent-of-union-members-never-voted-for-a-union.

least, necessitates a modified contract bar of a significantly shorter duration, to allow employees to express their representational preferences with full knowledge of the collective agreement's terms and the union's effectiveness.

Lastly, one of the most ancient and cherished principles in common law is the idea that an agent serves at the pleasure of the principal and can be removed by the principal at any time. *See generally Osborn v. Bank of U.S.*, 22 U.S. 738, 844 (1824) (discussing the relationship between a principal and agent). There are few, if *any*, other private entities with the state-granted privilege to ignore our deeply embedded legal traditions and continue to serve as an agent against the wishes of the principal. The contract bar undermines this principle and holds employees hostage to a union.

This case starkly proves the point. The employees won the election 11-0. Yet, despite the fact the employees unanimously agree that the Union does not adequately represent their interests, a contract bar may block its removal. Employees should not be barred from removing a Union whose collective bargaining agreement was so dubiously received by the employees that they unanimously rejected the Union in a secret ballot election. The contract bar's hostility to employee free choice is so acute the Union seeks to use it to force employees to work under an agreement none of them want. For the Board to do so would be to frustrate the freedom of association Sections 7 and 9 of the Act purport to protect.[5]

[5] To do so may also frustrate or violate Due Process. In a series of cases, the Supreme Court has held that a state contravenes the Due Process Clause by imposing employment terms on an unwilling party. *See Charles Wolff Packing Co.* v. *Court of Industrial Relations of Kansas* (*Wolff I*), 262 U.S. 522 (1923); *Dorchy* v. *Kansas*, 264 U.S. 286 (1924); *Charles Wolff Packing Co.* v. *Court of Industrial Relations of Kansas* (*Wolff II*), 267 U.S. 552 (1925) (collectively *Wolff*). The contract bar arguably would do the same thing here: it would require employees to submit to employment terms they do not want negotiated by a union they have rejected. Moreover, a collective bargaining agreement forced upon employees eliminates their right to individually bargain with their employer. An individual worker may negotiate on the basis of his own best

II. The Board should at least clarify that only an agreement containing the complete terms of employment executed by both parties can bar an election.

In *Appalachian Shale*, the Board set a "bright line" rule requiring all parties sign a contract before it raised a bar to an election petition. Even if the parties considered a contract properly concluded and put portions of it into effect, only an executed agreement could bar an election. *Appalachian Shale Prods.*, 121 NLRB 1160, 1161-62 (1958). The Board adopted this simple rule because before *Appalachian Shale* the various exceptions were "unduly complex." *Id.* at 1162. Instead, the Board felt "parties should be expected to adhere to this relatively simple requirement" of a fully executed contract. *Id.*

The Board recognized no exceptions to this rule, only noting that "on occasion contracts are not embodied in formal documents and that the parties, for reasons best known to them, execute and sign an informal document which nonetheless contains substantial terms and conditions of employment. Sometimes the agreement is arrived at by an exchange of a written proposal and a written acceptance, both signed." *Id*.

If there are informal documents, such as a written proposal and written acceptance, they "must clearly set out or refer to the terms of the agreement and must leave no doubt that they amount to an offer and an acceptance of those terms through the parties' affixing of their signatures." *Seton Medical Center*, 317 NLRB 87, 88 (1995). In this case, there is no question that the parties did not intend the email exchange to constitute the signing and execution of the collective bargaining agreement. According to the Regional Director's findings, the Union

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interests. In contrast, a union can "subordinate the interests of an individual employee to the collective interests of … the bargaining unit." *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 269 (2009). Indeed, a union has "powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents." *Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192, 202 (1944).

President "intended for the Employer to sign the collective bargaining agreement and return the signed agreement to the Union." RD Decision and Order, slip op. at *2. Indeed, the contract itself states that "the agreement shall be executed by both parties hereto." *Id.*

Even after the Union had signed the agreement, it never acted as if the Employer's emailing of the draft of the contract was a written offer that implicated the contract bar. On July 26, 2018, the Union sent an email asking if the Employer was "reneging" on the contract *because it was not yet executed*. *Id.* at 3 n.6. Common sense dictates that the parties thought signing of the collective-bargaining agreement and the email delivering the agreement to the Union were separate and distinct acts.

In the past, the Board on some occasions has improperly deigned minimal communications of offers and acceptance between parties as sufficient for contract bar purposes. *See Georgia Purchasing Inc.*, 230 NLRB 1174 (1977) (telegrams of union offer and employer acceptance permissible for contract bar); *Holiday Inn of Ft. Pierce*, 225 NLRB 1092 (1976) (signed cover letter sufficient for contract bar); *Riverside Hosp.*, 222 NLRB 907 (1976) (same). Acceptance of that type of disparate documents risks re-establishing the pre-*Appalachian Shale* confusion and legal uncertainty, where the Board would bar election petitions if the parties merely considered an agreement to have been properly concluded and began implementing it. *See, e.g. Oswego Falls Corp.*, 110 NLRB 621 (1954). If the Board considers these cases as remaining good law, it should overrule them and reassert the clear and simple *Appalachian Shale* rule that only a completed agreement signed by both parties will bar an election.

Certainly, modern technology can be a help in negotiations and *amicus* is not suggesting that emails cannot be helpful in the exchange of proposals. What *amicus* suggests is holding firm to a bright line rule that requires a contract to be signed and executed by both parties in one

document to establish a bar. The serious loss of employees' right to decertify an incumbent or select another union for three years demands as much.

To allow documents other than signed written agreements to bar elections would undermine *Appalachian Shale*'s purpose. Should the election in this case be overturned, it will open to litigation in future cases the question of whether parties who send emails with what appear to be only tentative agreements might have established a contract bar if the other party "accepts" unexpectedly. For example, litigation will ensue over whether an emailed acceptance will constitute a bar, even if the contract was never actually signed by either party.

Moreover, extending a rule that piecemeal offers and acceptances may bar a petition will invite collusion by incumbent unions and employers to undermine decertification or rival union petitions. It will also result in substantial delays in resolving representation elections, which would contravene one of the goals of *Appalachian Shale*—the expeditious disposition of representation cases.

More important, employees (who would not have access to the signed agreement or internal employer and union messages) will be uncertain at what point in the process an employer and incumbent union will have sufficiently consummated an agreement to bar their petition. Employees deserve the opportunity to know exactly when an election will be barred. The Board's desire for labor stability cannot mean the denigration of employee free choice. Rather, the Board should adopt a simple rule: only the mutual execution of a single completed document can create a contract bar.

Lastly, there is no legitimate reason to overturn the election here on the basis of a single email. The unit employees voted *unanimously* to rid themselves of an unwanted union. It does not aid labor stability to force these employees under the repression of a union none of them

want. Overturning the election on the basis that the employer might have *accidently* made a contract via an errant email would unfairly "make[] these [employees] . . . prisoners of the union," *Emporium Capwell Co.*, 420 U.S. at 73 (Douglas, J., dissenting).

CONCLUSION

The Board should eliminate the contract bar as inconsistent with the Act's primary goal of employee free choice. Alternatively, the Board should clarify that only a completed agreement signed by both parties will bar an election. In either event, the Regional Director's Decision and Direction of Election should be upheld, and the Union's Request for Review denied.

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May 21, 2018

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing amicus brief was filed electronically with the Executive Secretary through the NLRB's e-filing system, and copies were sent to the following additional parties via e-mail or by next day mail as noted:

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